Before the

FEDERAL MARITIME COMMISSION

DELHI PETROLEUM PTY. LTD., Complainant, v. U.S. ATLANTIC & GULF/AUSTRALIA - NEW ZEALAND CONFERENCE AND COLUMBUS LINE, INC., Respondents.	)	DOCKET NO. 88-2 DOCKET NO. 88-4

AGREEMENT OF SETTLEMENT AND MUTUAL RELEASE

It is hereby agreed, by and between the undersigned, complainant Delhi Petroleum Pty. Ltd. ("Delhi") and respondents U.S. Atlantic & Gulf/Australia - New Zealand Conference ("Australia Conference") and Columbus Line, Inc. ("Columbus"), that the dispute between these parties as embodied in Docket No. 88-2 and Docket No. 88-4 should be fully settled and resolved by mutual accord, on the following terms and conditions:

1. Within fifteen days after approval of this Agreement by the Federal Maritime Commission, Columbus shall pay to Delhi the sum of $44,372.57 in full satisfaction of Delhi's claims against Australia Conference and Columbus in Docket No. 88-2 and Docket No. 88-4, said sum having been determined as follows:

DOCKET NO. 88-2

Container No.	Overcharge
1. SCXU 287864-3	$ 1111.10 1/
2. SCPU 247134-1	$ 1111.10 1/
3. SCXU 248275-5	$ 1111.10 1/
4. SCXU 247554-4	$ 759.28 2/
5. SCXU 287929-6	$ 890.11 3/
6. SCXU 248313-4	$ 890.11 3/
7. SCXU 248395-7	$ 890.11 3/
8. SCXU 247519-1	$ 759.28 2/
9. SCXU 437642-8	$ 3648.93 4/
10. SCXU 437628-5	$ 3648.93 4/
11. SCXU 420098-0	$ 2802.69 5/
12. SCXU 420086-6	$ 2422.48 6/
13. SCXU 437652-0	$ 2565.45 7/
Total Docket No. 88-2	$22,610.67

1/ Calculated on basis of 1480 cu. ft. + 40 cu. ft. x $145 ($5365.00) minus 1180 cu. ft. + 40 cu. ft. x $144.20 ($4253.90).

2/ Calculated on basis of 1373 cu. ft. + 40 cu. ft. x $145 ($4977.13) minus 1170 cu. ft. + 40 cu. ft. x $144.20 ($4217.85).

3/ Calculated on basis of 1373 cu. ft. + 40 cu. ft. x $145 ($4977.13) minus 1133.71 cu. ft. + 40 cu. ft. x $144.20 ($4087.02).

4/ Calculated on basis of 3067 cu. ft. + 40 cu. ft. x $145 ($11,117.88) minus 2071.83 cu. ft. + 40 cu. ft. x $144.20 ($7468.95).

5/ Calculated on basis of 2933 cu. ft. + 40 cu. ft. x $145 ($10,632.13) minus 2171.83 cu. ft. + 40 cu. ft. x $144.20 ($7829.44).

6/ Calculated on basis of 2880 cu. ft. + 40 cu. ft. x $145 ($10,440.00) minus 2224.17 cu. ft. + 40 cu. ft. x $144.20 ($8017.52).

7/ Calculated on basis of 2880 cu. ft. + 40 cu. ft. x $145 ($10,440.00) minus 2184.34 cu. ft. + 40 cu. ft. x $144.20 ($7874.55).

DOCKET NO. 88-4

Container No.	Overcharge
1. SCPU 812059-7	$ 1738.23 1/
2. SCXU 813873-1	$ 1738.23 1/
3. SCXU 814379-0	$ 1738.23 1/
4. CONU 001455-8	$ 1738.23 1/
5. SCXU 437866-3	$ 3504.38 2/
6. SCXU 443822-1	$ 3504.38 2/
7. SCXU 437776-4	$ 3504.38 2/
8. XRTU 650350-3	$ 3504.38 2/
9. SCXU 811695-9	$ 791.46 3/
10. CONU 000529-0	------
Total Docket No. 88-4	$21,761.90

1/ Calculated on basis of 1653 cu. ft. ÷ 40 cu. ft. x $145 ($5992.13) minus 1180 cu. ft. ÷ 40 cu. ft. x $144.20 (4253.90).

2/ Calculated on basis of 2720 cu. ft. ÷ 40 cu. ft. x $145 ($9860.00) minus 1763 cu. ft. ÷ 40 cu. ft. x $144.20 ($6355.62).

3/ Calculated on basis of 1360 cu. ft. ÷ 40 cu. ft. x $145 ($4930.00) minus 1148 cu. ft. ÷ 40 cu. ft. x $144.20 ($4138.54).

2. Delhi, in consideration of said payment as provided in paragraph 1 above, hereby releases Australia Conference and Columbus from any and all claims arising out of the shipments which are the subject of the claims in Docket No. 88-2 and Docket No. 88-4. Delhi shall, in addition, agree to dismissal with prejudice of the complaints in Docket No. 88-2 and Docket No. 88-4.

3. Neither Delhi, Australia Conference, Columbus nor any successor in interest of the foregoing parties, shall initiate any new claim against any of the other parties

arising in connection with the complaint in Docket No. 88-2 or Docket No. 88-4, except for enforcement of any provision of this Agreement.

4. It is understood and agreed that this Agreement of Settlement and Mutual Release is in full accord and satisfaction of all the claims involved in Docket No. 88-2 and Docket No. 88-4.

5. This Agreement of Settlement and Mutual Release shall be submitted for any necessary approval to the appropriate governmental authorities, and shall become effective and binding upon the parties when such approval is obtained.

6. This Agreement of Settlement and Mutual Release constitutes the entire agreement between the parties.

U.S. ATLANTIC & GULF/AUSTRALIA - NEW ZEALAND CONFERENCE

By: 

MARC J. FINK
Dow, Lohnes & Albertson
1255 Twenty-Third St., N.W.
Suite 500
Washington, D.C. 20037
(202) 857-2500

COLUMBUS LINE, INC.

By: _____
MARC J. FINK
Dow, Lohnes & Albertson
1255 Twenty Third St., N.W.
Suite 500
Washington, D.C. 20037
(202) 857-2500

DELHI PETROLEUM PTY. INC.

By: _____
ROBERT C. OLIVER
Sharpe & Kajander
1140 Mellie Esperson Bldg.
815 Walker
Houston, Texas 77002

Before the

FEDERAL MARITIME COMMISSION

DELHI PETROLEUM PTY. LTD., Complainant, v.	)	DOCKET NO. 88-2
U.S. ATLANTIC & GULF/AUSTRALIA - NEW ZEALAND CONFERENCE AND COLUMBUS LINE, INC., Respondents.	)	DOCKET NO. 88-4

JOINT AFFIDAVIT IN SUPPORT OF SETTLEMENT AGREEMENT

We, the undersigned, on behalf of complainant Delhi Petroleum Pty. Ltd. ("Delhi") and respondents U.S. Atlantic & Gulf/Australia - New Zealand Conference ("Australia Conference") and Columbus Line, Inc. ("Columbus"), and being each first severally sworn, depose and say for and on behalf of our respective parties:

1. The dispute in Docket No. 88-2 and Docket No. 88-4 arises out of the shipment of certain oil pumping equipment to Australia. Delhi alleges that Australia Conference and Columbus assessed charges in excess of those lawfully applicable on shipments from Houston to Australia in 1984. In response to this allegation, respondents contended that there was insufficient evidence to conclude that any overcharging had occurred.

2. Following the filing of these complaints, the parties engaged in settlement discussions, with the Administrative Law Judge and on their own, and devoted very significant time to try and resolve their differences. After many discussions and the production and inspection of a substantial number of documents, the parties ultimately concluded that the evidence presented by Delhi in its various pleadings and accompanying exhibits supported the resolution of the dispute in a manner consistent with the calculations set forth in the Agreement of Settlement and Mutual Release ("Settlement Agreement").

3. Because the cargo at issue left the possession of the parties before measurements of the cargo could be undertaken, the parties have had to use their best efforts to arrive at accurate estimations. The process of arriving at accurate estimations of the volume of the cargo at issue has proved extremely complicated. The calculations set forth in the accompanying Settlement Agreement reflect what the parties believe is a reasonable compromise of this dispute. With respect to a number of the containers, "comparison units" have been utilized to determine the total cubic feet of cargo. In other instances, total cubic feet has been determined by the use of a good faith estimate of what would fit in a particular container. The figures utilized are supported by the record, but are used only to resolve this

dispute under the particular facts of this case and have no precedential value whatsoever.

4. The claims involved in Docket No. 88-2 and Docket No. 88-4 arise under the Shipping Act of 1984, and present a genuine dispute, the facts critical to the resolution of which are not readily ascertainable.

5. The parties to Docket No. 88-2 and Docket No. 88-4 have entered into the accompanying Settlement Agreement which, upon approval by the Commission, will conclusively resolve their dispute.

6. The accompanying Settlement Agreement was entered into after a full and thorough consideration of all the material circumstances involved herein, including, among other things, the estimated cost of further litigating the issues herein, the possibility to each party of an unfavorable decision on the merits after further litigation, and the desirability of maintaining amicable relations between the parties.

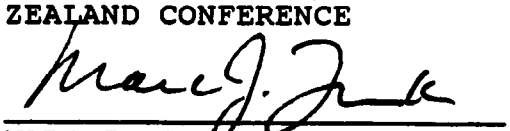
7. The accompanying Settlement Agreement is a fair and reasonable commercial settlement of the dispute in this case which will avoid the need for further extensive, costly and economically unjustified litigation.

8. The accompanying Settlement Agreement is a bona fide attempt by the parties to terminate this controversy in a commercially reasonable manner, and is not a device to

obtain transportation at other than the lawfully applicable rates and charges or otherwise circumvent the requirements of the Shipping Act of 1984 or any other applicable law.

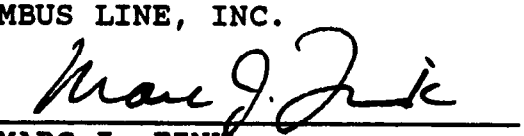
WHEREFORE, for all the foregoing reasons, the parties respectfully request Commission approval of their settlement, and dismissal of the proceeding herein, in accordance with the terms of the accompanying Settlement Agreement.

U.S. ATLANTIC & GULF/AUSTRALIA - NEW ZEALAND CONFERENCE

By: 

MARC J. FINK
Dow, Lohnes & Albertson
1255 Twenty-Third St., N.W.
Suite 500
Washington, D.C. 20037
(202) 857-2500

COLUMBUS LINE, INC.

By: 

MARC J. FINK
Dow, Lohnes & Albertson
1255 Twenty Third St., N.W.
Suite 500
Washington, D.C. 20037
(202) 857-2500

DELHI PETROLEUM PTY. INC.

By: _____

ROBERT C. OLIVER
Sharpe & Kajander
1140 Mellie Esperson Bldg.
815 Walker
Houston, Texas 77002

(S E R V E D)
(AUGUST 12, 1988)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

August 12, 1988

NO. 88-2

DELHI PETROLEUM PTY. LIMITED

v.

U.S. ATLANTIC & GULF/AUSTRALIA-NEW ZEALAND CONFERENCE AND COLUMBUS LINE, INCORPORATED

NO. 88-4

DELHI PETROLEUM PTY. LIMITED

v.

U.S. ATLANTIC & GULF/AUSTRALIA-NEW ZEALAND CONFERENCE AND COLUMBUS LINE, INCORPORATED

Complainant, an importer of oilfield equipment, alleged that respondent carrier overcharged it on two shipments of such equipment to Australia involving 23 containers because the carrier calculated freight on the basis of erroneous packing lists containing incorrect measurements. Complainant also alleged that respondent carrier and conference had unfairly treated it and prejudiced it in the manner of processing the claims. After several years of informal dispute and several months of formal litigation, totaling three years in all, the parties were finally able to reach settlement. It is held:

(1) The settlement agreement is a bona fide effort to terminate a long controversy and is not a device to circumvent tariff law and complies with the requirements set forth in previous case law for approval of such settlements. The central problem has been that it is impossible to remeasure the same oilwell equipment as it was stowed in the same containers that moved in the shipments which occurred in late 1984 and early 1985, such equipment having been sent to the oil fields. Therefore, the critical facts necessary to resolve the dispute are not possible to obtain.

(2) In the absence of direct evidence of what the cargo measured, the parties have settled on the basis of available, reasonable secondary evidence, namely, the evidence of what a comparable unit measured in a comparable container shipped at or near the time of the shipment in question and, when such evidence was not available, a reconstructed measurement based on interior dimensions of the type of containers used and estimated net heights of the cargo. Such evidence provides a sensible basis for recalculating freight and to authorize respondent carrier to pay complainant $44,372.57 in satisfaction of all claims, including those concerning respondents' alleged unfairness in treating the claims.

Robert C. Oliver for complainant.
Marc J. Fink for respondents.

SETTLEMENT APPROVED; COMPLAINTS DISMISSED[1]

These two proceedings involve complaints by an Australian importer of oilfield equipment and supplies known as Delhi Petroleum Pty. Ltd., in which Delhi alleged that it was overcharged on two shipments of oilwell equipment and supplies which were carried by respondent Columbus Line, Inc. from Houston, Texas, to Brisbane, Australia, on ships sailing from Houston in December 1984 and January 1985. More specifically, in No. 88-2, Delhi claimed that the oilwell equipment and supplies packed in 13 containers were incorrectly measured and that as a result, Delhi was overcharged in the amount of $34,020.50, for which Delhi sought reparations plus interest and attorney's fees. In No. 88-4, Delhi claimed that the oilwell equipment and

[1] These two proceedings, which involve substantially the same issues, are consolidated for purposes of these rulings. See 46 CFR 502.148. These rulings will become the rulings of the Commission absent appeals or review by the Commission. See 46 CFR 502.227(b),(c), and (d).

supplies packed in 10 containers were incorrectly measured and that, as a result, Delhi was overcharged in the amount of $25,079.84, for which Delhi sought reparations plus interest and attorney's fees. Total reparations sought were, therefore, $59,100.34, plus interest and attorney's fees.

The above allegations, if proven, would constitute violations of section 10(b)(1) of the Shipping Act of 1984, 46 U.S.C. app. sec. 1709(b)(1), which prohibits carriers from charging rates other than those specified in their tariffs. In addition, Delhi alleged that respondent Columbus and the Conference to which it belongs, the U.S. Atlantic and Gulf/Australia-New Zealand Conference, unfairly treated Delhi and discriminated against or prejudiced Delhi in the manner in which respondents contracted with Delhi regarding volume of freight and as regard respondents' treatment of Delhi in the manner of adjusting and settling Delhi's claims. If proven, such conduct would violate sections 10(b)(6)(A), 10(b)(6)(E), and 10(b)(12) of the 1984 Act, 46 U.S.C. app. secs. 1709(b)(6)(A), 1709(b)(6)(E), and 1709(b)(12).

The complaint in Docket No. 88-2 was filed on January 7, 1988. The complaint in No. 88-4 was filed on February 29, 1988.[2]

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[2] Although no party raised the question, because of the age of the shipments and the filing of the complaints, I examined the facts to make sure that the claims were not barred by the running of the three-year period of limitations set forth in section 11(g) of the 1984 Act, 46 U.S.C. app. sec. 1710(g). This statute, like section 22(a) of the 1916 Act (46 U.S.C. app. sec. 821(a)) which set forth a two-year period of limitations, is a jurisdictional condition to the filing of complaints seeking (Continued on following page.)

However, the dispute between Delhi and respondents had been going on for several years before the complaints were filed. To summarize the salient facts, in early 1984, Delhi had negotiated a project rate with the Conference for shipments of oilwell equipment. This rate, which, when various applicable discounts were taken into account, amounted to a rate of $144.20 W/M, became effective in the Conference tariff in March 1984, designed for shipments to a project in Australia known as the "Jackson Oilfield Project." Shipments to this project began in July 1984 and continued into 1985 with the heaviest movements from December 1984 through March 1985.

No one noticed any problems with the various shipments moving to Australia until March 1985. At that time, however, a representative of Delhi in Brisbane apparently noticed a

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[2] (Continued from preceding page.) reparations. See U.S. Borax & Chem. Corp. v. Pac. Coast European Conf., 11 F.M.C. 451, 471-472 (1968); Aleutian Homes, Inc. v. Coastwise Line et al., 5 F.M.B. 602, 612 (1959). The Commission has held, however, that the cause of action accrues at the time of payment of freight if that time is later than the date of shipment. See Aleutian Homes, Inc., cited above, 5 F.M.B. at 611; Phillips-Parr v. E.L.M.A., 21 SRR 1240, 1242 (ALJ 1982), and cases cited therein. In No. 88-2, payment of freight was made in Australia on January 8, 1985. (Attachment F to the complaint.) Three years after that date is January 8, 1988, which, because of the International Date Line, corresponds to January 7, 1988, in Washington, D.C., the date of filing of the complaint. Similarly, in No. 88-4, date of payment in Australia was March 1, 1985. Three years later is March 1, 1988, in Australia, which corresponds to February 29, 1988, in Washington, D.C., the date of filing of the complaint. See U.S. v. Theriaque, 674 F.Supp. 395, 397 (D. Mass. 1987); Evans v. Hawker-Siddeley Aviation, Ltd., 482 F.Supp. 547, 550 (S.D.N.Y. 1979) (can file complaint on last day of three-year or two-year period, i.e., anniversary date); see also 51 Am. Jur. 2d, Limitation of Actions, secs. 58, 59; CSC Intl. Inc. v. Waterman, 19 F.M.C. 332, 333 (1976); Rules of Practice and Procedure, 17 SRR 302, 303 (1977); 46 CFR 502.101(a).

discrepancy between cargo volumes as shown in the applicable bill of lading for a shipment consisting of 19 flat-rack containers (the same shipment involved in No. 88-4) and the volumes which appeared to exist in the containers. The Delhi representative arranged to have some of the equipment remeasured by marine surveyors in Brisbane known as James, Plumley, & Pearson, before they were all removed from the custody of the carrier, Columbus. On the basis of this remeasurement while in the custody of Columbus, Columbus refunded approximately $31,000 to Delhi in Australia on or about April 1985. Another refund was apparently made by Columbus on a later shipment.

Although Columbus and Delhi were able to resolve their differences regarding these remeasured containers, problems remained as to shipments such as the two involved in No. 88-2 and 88-4 which moved during December 1984 and January of 1985, as regards that portion of the shipment in No. 88-4 which was not remeasured by the marine surveyors in Brisbane and the shipment in No. 88-2. Apparently Delhi became concerned that the packing lists prepared by a company in the United States known as the 7 Santini Brothers were inaccurate and were consistently overstating measurements of the cargo packed in the containers. At the request of Delhi, Santini looked into the problem and on July 31, 1985, notified the Conference that Santini had made mistakes in recording the measurements and that its computer apparently had overstated measurements by recording the gross volume of the containers rather than the net volume of their

contents and perhaps by adding other volumes as well.[3] Santini further acknowledged its errors after inspecting the packaging and loading performed by another company known as Superior Packing for other shipments of oilwell equipment handled for Delhi consigned to the same project.

On August 1, 1985, Delhi presented its claims for refunds on the subject containers in No. 88-2 and those containers not remeasured in Brisbane on the shipment involved in No. 88-4. The claims were denied by the Conference later that month. Delhi submitted modified claims to the Conference in late January 1986, but the Conference again rejected them in February 1986. The Conference denied the claims on the basis of its tariff rules requiring that claims be supported by certain evidence such as a certified copy of the original invoice or a certified statement from a responsible employee establishing the true nature of the goods. In response, Delhi produced additional documents and furthermore obtained data concerning the weights and measurements of each component of the pumping equipment shipped, completing the process in some 12 months, after which Delhi submitted the claims for the third time on April 21, 1987. Respondents again

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[3] See the letter from Mr. R. J. Maxwell, Manager of Administration, 7 Santini Brothers, to Mr. Thomas J. Conroy of the Conference, dated July 31, 1985. (Atachment H to both complaints.) Mr. Maxwell concedes that Santini had recorded the exterior dimensions of the containers and had included volume of the thick base board of the containers rather than recording the net volume of the cargo. Mr. Maxwell's letter also mentions other errors which are somewhat confusing. In view of the settlement, it is not necessary to determine exactly what the Santini errors were. It suffices that the record contains other evidence that the Santini figures were not reliable and did not record the correct measurements of the cargo, as I mention later.

rejected the claims in May 1987, relying on their tariff rules requiring certified copies of invoices or certified statements of responsible employees or a public weighers certificate.[4] Some time after the apparent end of these informal negotiations between Delhi and the Conference, Delhi began filing complaints with the Commission, one informal and the other two, which are the subject of this decision.[5]

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[4] Resondents consistently rejected the claims submitted by Delhi in reliance on their tariff Rule 18(b) and (d) concerning claims. These rules required submission of a certified copy of the shipper's original invoice, or a certified statement of a responsible employee of the shipper establishing the true nature of the goods, an explanation of the original erroneous description and, in claims regarding weights, a public weighers certificate. Respondents took the position that to pay refunds on the basis of the information submitted by Delhi would constitute rebating and violate shipping law. See No. 88-2, respondents' answers at 12-13; No. 88-4, respondents' answers at 11-12. Delhi argued that the requirements of Rules 18(b) and (d) were irrelevant or inapplicable under the circumstances in which the dispute centered on measurements, not weights, and in which Delhi had submitted a letter from Santini admitting errors in measurements and other detailed evidence. See No. 88-2, Delhi's replies at 9-10; No. 88-4, Delhi's replies at 9-10. These arguments deal with the question whether respondents unfairly treated Delhi in the matter of adjustment of claims in violation of section 10(b)(6)(E) of the 1984 Act. Because the parties have reached settlement on the main issue concerning alleged overcharges and wish to discontinue litigation, it is not necessary to determine this subsidiary issue.

[5] The other complaint concerning another shipment of oilwell equipment was filed in Informal Docket No. 1605(I), Delhi Petroleum Pty. Ltd. v. Columbus Line, Inc.. On June 2, 1988, Settlement Officer Norris denied the claim. Although finding that the Santini measurement figures were excessive, the claims were denied because on nine of the 17 containers in issue the containers were undercharged on account of Columbus's failure to raise the volume measurement to the minimum required by the tariff. This undercharging virtually wiped out any overcharge.

Development of the Record and Procedure Followed

At an early stage of these proceedings, the parties decided that the best way to develop the record was by means of written evidence rather than by trial-type hearings. Accordingly, written evidence and arguments were submitted by complainant, respondents, and complainant in three stages. Following submission of the last evidence by complainant in both proceedings in April 1988, a telephonic prehearing conference was conducted on April 22, 1988. The parties agreed that trial-type hearings ought to be avoided but that in view of an apparently insuperable problem regarding the impossibility of remeasuring the exact equipment that had been shipped in December 1984 and January 1985 and which is the subject of dispute, the cases appeared to be eligible for settlement under the principles enunciated by the Commission in Organic Chemicals (Glidden-Durkee) Corp. v. Atlanttrafik Express Service, 18 SRR 1536a, 1540 (1979). Specifically, the parties recognized that "the facts critical to the resolution of the dispute are not reasonably ascertainable" as was the case in Glidden-Durkee, and that they ought to begin settlement discussions. (See Notice of Rulings Made at Telephonic Prehearing Conference, April 25, 1988.) Accordingly, discussions began on or after April 22, 1988, and continued thereafter until agreement was finally reached and the documents embodying the agreement were filed on August 3, 1988. Thus, settlement could not be reached for over three months on top of the period of time beginning on or about August 1, 1985, during which time Delhi and respondents had discussed Delhi's

claims informally. In all, three years' time was consumed between submission of Delhi's first claims and submission of the settlement agreement in these proceedings. This fact is mentioned not to cast aspersions on the parties but to show that the parties have been continuously and vigorously at issue and that respondents are not simply acquiescing in the demands of a shipper customer. In other words, this fact is some indication that the settlement is "a bona fide attempt by the parties to terminate their controversy and not a device to obtain transportation at other than the applicable rates and charges. . .," a condition required before settlements of this kind can be approved according to the Commission's decision in Glidden-Durkee, cited above, 18 SRR at 1539-1540.[6]

The Reasons for and the Need for a Settlement

A consideration of the evidence submitted in support of Delhi's claims and the nature of the matters at issue quickly show that these cases are probably the best example of the wisdom

[6] To illustrate further the fact that the parties have been vigorously adhering to their positions, I cite the fact that as late as June 23, 1988, it did not appear that they would be able to reach settlement. Accordingly, at their request, to help them, I utilized an alternative method of dispute resolution, namely, a type of minitrial or summary trial by which I outlined to them my tentative evaluation of the evidence that they had submitted in the hope that this would enable them to reconsider their positions and reach settlement. See Notice of Rulings Made at Second Telephonic Prehearing Conference, June 24, 1988, and the authorities cited on page 2, note 1. See also my letter to the parties, dated June 24, 1988, outlining my evaluations and tentative decision. See also Summary Jury Trial, 103 F.R.D. 461 (1984). This technique apparently worked because the parties later agreed to settle on the basis of the evaluations contained in my letter.

of the Glidden-Durkee decision. In fact, after analyzing the evidence and the issues, I can think of no other case which has been or would be more suitable for settlement under the Glidden-Durkee standards, especially the standard that the "facts critical to the resolution of the dispute are not reasonably ascertainable." Furthermore, the critical facts in these cases are even less ascertainable than were those in the original Glidden-Durkee case itself, as I will explain below. The following discussion illustrates my reasons for these conclusions.

The essential problem in these proceedings is that although the original oilwell equipment and parts which were shipped during December 1984 and January were apparently mismeasured, it is obviously impossible to retrieve the units from the oil fields in Australia, repack them in the same containers in which they had moved, and remeasure them in the manner required by the relevant tariff rule. Thus, according to the Conference's tariff Rule 31(c), applicable to cargo in containers, "freight shall be paid on the actual weight and/or measurement of cargo in containers. . . ." (See Attachment D in both Nos. 88-2 and 88-4.)[7] Because the actual units of equipment that were shipped

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[7] There is another tariff Rule (2(d)) which respondents have cited in their dealings with Delhi regarding the proper measurement of cargo. As quoted by respondents, Rule 2(d) provides in part that "rates will be assessed on the accurate shippers gross weight and overall measurement of the individual pieces or packages calculated when the cargo is delivered to the carrier and measurements shall be computed in accordance with Tweeds Accurate Cubic Tables." (See No. 88-2, Attachment G to respondents' answer, telex dated June 2, 1986.)

in containers in December 1984 and January 1985 cannot be reloaded into the same containers and remeasured, how is one to determine what they must have measured at the time? Furthermore, if there is evidence, as there is, that the original measurements shown on the Santini packing lists were incorrect, that some overcharges occurred, and that consequently respondent Columbus ought to refund these overcharges, is it fair to deny Delhi any refunds because of the fact that it is impossible to remeasure the actual equipment that moved in the actual containers?[8]

Because of the unavailability of such direct evidence, Delhi has had to assemble different types of secondary evidence which it has presented to respondents and now to the Commission in Docket Nos. 88-2 and 88-4, as alternative measurements to the erroneous Santini measurements. In this regard, Delhi has presented models of what it claims to be similar units that were measured in containers by marine surveyors, measurements of unpacked components of the units derived from the manufacturer, and finally, reconstructed measurements derived partially from the original Santini figures and partially from standard

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[8] I have mentioned earlier that Mr. Maxwell of Santini admitted that Santini had incorrectly measured the units in the containers and that there was other evidence indicating that Santini erred. Thus, when 10 containers of the 19 containers in the shipment in No. 88-4 were remeasured in Brisbane by marine surveyors and found not to correspond to the Santini figures, Columbus adjusted freight accordingly. Furthermore, a comparison of the original Santini packing list measurement figures with the standard dimensions of the type of containers used indicates that Santini measured exterior dimensions of the containers, not the dimensions of the cargo inside the containers. (See Attachment G, Santini packing lists, and complainant's replies at pages 6-7 in both dockets.)

measurements of the same type of containers. None of these alternatives is perfect. However, in the absence of direct evidence which cannot be obtained, there is little else that one can do except to utilize such evidence and apply the most reliable method of remeasurement now available to each container in the two shipments. Ultimately, the parties have agreed to do this as a means to settle their long dispute without conceding that the methods or evidence used is superior to some other method or evidence that they would advocate if litigation had to continue.

The Basis for the Settlement and Recalculations of Freight

The evidence on which the parties have agreed to settle and to calculate the amount of refunds consists of two types. First, whenever there was evidence of remeasurement of identical pumping unit models which moved in similar containers and were packed at or about the same time as the containers in issue, such remeasurement was followed. However, if such evidence of remeasurement was not available because remeasured pumping units bore different model numbers or were packed at more distant points in time or for some other reason, alternative evidence was used. This evidence consists of a calculation of the volumes of pumping units stowed in containers derived by multiplying the interior length of a standard-sized container used in the shipment times the interior width of such container. This product was then multiplied by the net height of the cargo. The figure for net height of the cargo was derived from the gross

height of the cargo shown by the Santini packing list reduced to net height of the pumping unit by using standard height figures for the types of containers used as shown in an industry reference work.[9] This method of reconstructing the measurements of pumping units produces figures which approximate the interior capacity of an open-top, flat-rack container such as those used in the shipments in question as adjusted to reflect the fact that the odd-shaped pumping units were often so tall that they projected over the tops of the container sides. Like any other method of reconstructing measurements of pumping units shipped in open-top, flat-rack containers, it is not perfect and approximates rectangular capacity rather than the precise dimensions of the odd-shaped pumping units. However, it has some basis in reason and shipping custom.[10]

Having agreed to rely upon these two types of evidence, the parties applied them to the containers in issue as follows. In

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[9] The reference work is The Official Intermodal Equipment Register, issued by the Intermodal Publishing Company, Ltd. The March 1988 edition of this work bears the notation "FMC F No. 74" and is available in the Commission's tariff office.

[10] As the Commission has become aware, it is generally the custom in the shipping business to measure odd-shaped cargoes by taking the maximum points for length, width, and height, a process called "rectangularization." See, e.g., Orleans Material and Equipment Co., Inc. v. Matson Navigation Co., 8 F.M.C. 160, 163 (1964) (3 SRR 1055, 1058-1059); U.S. Pipe and Foundry Co. v Tampa Inter-Ocean S.S. Co., 1 U.S.S.B. 173, 175 (1930). There is some indication that this custom may be applicable under respondents' tariff. See Informal Docket No. 1605(I), Delhi v. Columbus, cited earlier, at page 13. It is not necessary to explore the propriety of the custom in these cases further, however, in view of the settlement, and, as with the rest of the settlement, it is understood that the parties are utilizing the evidence for purposes of settlement and not as admissions.

Docket No. 88-4, there are nine containers (formerly 10) in issue.[11] For the first eight containers, the marine surveyors in Brisbane remeasured pumping units bearing the same model numbers as those in issue which were shipped as part of the same shipment, which shipment consisted of 19 containers in all. The marine surveyors found that a pumping unit shipped in one of the 20-foot containers measured 1180 cubic feet while such unit shipped in one of the 40-foot containers measured 1763 cubic feet. Therefore, for freighting and refund purposes, measurement of the disputed pumping units in 20-foot containers is reduced from the original Santini figure of 1653 cubic feet to 1180 cubic feet while, for the 40-foot containers, the figures are reduced from Santini's 2720 to 1763 cubic feet. The remaining container in issue (claim no. 9) consisted of a number of auxiliary pieces of equipment and master weights. There was no comparable remeasured unit. Accordingly, the alternative method of reconstructing volume described above was used. This resulted in a reduction of the measurement from Santini's original 1360 cubic feet to 1148 cubic feet.

In Docket No. 88-2, 13 containers are in issue. As to the first three of these containers, the parties agree to recalculate freight on the basis of the measurement figure that the marine

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[11] Complainant has evidently withdrawn its claim as to container no. 10 in No. 88-4. The cargo in this container was remeasured in Brisbane but was found to be weight-type rather than measurement-type and was re-rated on the original weight figures. Therefore, the dispute about the correct measurement is irrelevant as far as this container is concerned. (See Attachment J, to complaint in No. 88-4.)

surveyors found for the same pumping unit model number that moved in a 20-foot flat rack container in Docket No. 88-4. As discussed above, the marine surveyors found that such pumping unit measured 1180 cubic feet. Therefore, the parties agree to reduce the measurement from Santini's original figure of 1480 cubic feet to 1180. It is recognized that the remeasured model unit sailed from Houston in January 1985 and that the subject units in issue sailed during the preceding month. However, otherwise they were similar or identical in unit model number and type of container used and were packed by the same company in the United States.

As to the remaining 10 containers in issue, there is no suitable remeasured pumping unit which can be used for comparison purposes. This is because remeasured units did not bear identical model numbers as to those in dispute or were remeasured at distant points in time on later voyages or the container in dispute was laden with unmeasured parts from other pumping units. Therefore, the parties agree to recalculate freight on the basis of the alternative method of deriving volumes described above, i.e., by multiplying interior container length times interior container width times the derived net height of the pumping unit. The calculation for each container in dispute showing reduction of measurement from the original Santini figures to the lower

volumes is shown on page 2 of the Agreement of Settlement and Mutual Release, attached to this decision.[12]

DISCUSSION AND CONCLUSIONS

In view of the settlement reached by the parties, the only question for me to determine is whether their settlement satisfies the standards and requirements set forth in previous case law.

There are, of course, countless decisions of the Commission and the courts holding that settlements are to be encouraged and that the courts and the Commission engage in presumptions that favor findings that settlements are fair, correct, and valid. This policy is especially encouraged in administrative law and has been codified in the Administrative Procedure Act (APA) and cited by the courts as being of the "greatest importance" to the functioning of the administrative process. See discussion and cases cited in Old Ben Coal Company v. Sea-Land Service, Inc., 21 F.M.C. 505, 512 (1978); Ellenville Handle Works, Inc. v. Far Eastern Shipping Company, 20 SRR 761, 762-763 (ALJ, F.M.C. notice of finality, February 25, 1982); Behring International, Inc.,

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[12] There were typographical errors in footnote 3 to the original page 2 of the Agreement concerning the recalculations of freight on containers nos. 5, 6, and 7 in No. 88-2. I have inserted a corrected page as furnished by the parties. (See cover letter to me, dated August 8, 1988.) Incidentally, it should further be noted that all the freight recalculations were done on the basis of the correct rate of $144.20 W/M, not the rate of $145 W/M, which was originally used. The $144.20 rate is derived from the tariff rate of $196.50 less a 20-percent discount in the tariff and a further tariff reduction of $13 per ton. (See Attachment D to both complaints.)

20 SRR 1025, 1032 (I.D., F.M.C. notice of finality, June 20, 1981); Pennsylvania Gas & Water Co. v. Federal Power Commission, 463 F.2d 1242, 1247 (D.C. Cir. 1972); APA, 5 U.S.C. sec. 554(c)(1). See also Commission rule 91, 46 CFR 502.91, which is patterned after the cited provision of the APA. Consistent with this policy, the Commission has approved settlements in numerous types of cases involving allegations of violations of shipping laws. See list and description of such cases in Del Monte Corporation v. Matson Navigation Company, 22 F.M.C. 364, 368-369 (1979).

Notwithstanding the policy described, the Commission does not perfunctorily approve proffered settlements. As the Commission has stated in previous cases, "the Commission does not merely rubber stamp any proffered settlement," but will rather examine any settlement to ensure that it does not contravene any law or public policy, is fair, adequate, and reasonable, and is not the product of collusion or coercion. Old Ben, cited above, 21 F.M.C. at 512-514; Kuehne & Nagel, Inc., 20 SRR 1533, 1541 (I.D., F.M.C. notice of finality, October 13, 1981); Perry's Crane Service v. Port of Houston Authority, 22 F.M.C. 30, 33 (1979). See also Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977) (court must find that a proposed settlement is fair, adequate and reasonable and is not the product of collusion between the parties.)

Generally, when examining settlements, the Commission looks to see if the settlement has a reasonable basis and reflects the careful consideration by the parties of such factors as the

relative strengths of their positions weighed against the risks and costs of continued litigation. Furthermore, if it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement. See, e.g., Old Ben, cited above, 21 F.M.C. at 513; Perry's Crane Service v. Port of Houston Authority, cited above, 22 F.M.C. at 34; Maizena S.A. v. Flota Mercante Grancolombiana S.A., 21 SRR 522, 525-526 (I.D., F.M.C. notice of finality, March 22, 1982). However, in a case involving alleged overcharges, the Commission is especially concerned that the integrity of the tariff be preserved to the extent possible and that the proffered settlement be a bona fide attempt to terminate a legitimate controversy. For that reason, the Commission requires that parties tendering settlements in such cases do three things: 1) submit a signed statement to the Commission; 2) file an affidavit setting forth the reasons for the settlement and attesting that the settlement is a bona fide attempt by the parties to terminate their controversy and not a device to obtain transportation at other than applicable tariff rates in contravention of law; and 3) show that the complaint on its face presents a genuine dispute and the facts critical to the resolution of the dispute are not reasonably ascertainable.

Glidden-Durkee, cited above, 18 SRR at 1539-1540; Mobil Oil Corporation v. Barber Blue Sea Line, 24 SRR 217, 218 (1987).[13]

Evaluation of the Proposed Settlement Under Applicable Standards of Law

The parties to these proceedings have complied with the requirements set forth in Glidden-Durkee and other applicable cases in every respect. Furthermore, there is evidence in the record showing the basis for their settlement and establishing the reasonableness of the recalculations of measurements and freight consistent with tariff requirements.

First, as required by Glidden-Durkee, the parties have submitted a Joint Affidavit in Support of Settlement Agreement together with an Agreement of Settlement and Mutual Release, attached to these rulings. As is customary with such settlement agreements, complainant Delhi agrees to release respondents Columbus and the Conference from its claims in these two

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[13] The Commission has followed the policy enunciated in Glidden-Durkee since 1979 in authorizing settlements in overcharge cases too numerous to mention here. See, e.g., Ellenville Handle Works, cited above, 20 SRR 761; Maizena S.A., cited above, 21 SRR 522; Celanese Corporation, Inc. v. The Prudential Steamship Company, 20 SRR 27 (1980). There has been some flexibility in administering the requirements of Glidden-Durkee, however. For instance, if there is independent evidence that a settlement was reached without the intent to circumvent tariff law, the technical requirement that a formal affidavit be submitted attesting to good faith has been waived. See Docket No. 80-64, Cutter Laboratories Overseas Corporation v. Maersk Lines, Settlement Approved, November 21, 1980 (ALJ); F.M.C. notice of finality, January 6, 1981 (unreported). See also Kuehne and Nagel, Inc. v. Barber Blue Sea and Nedlloyd Lines, 23 SRR 136, 137 n. 1 (ALJ; F.M.C. notice of finality, June 4, 1985) (written paraphrase of stipulation settling case filed in docket).

proceedings and agrees to dismissal of its complaints with prejudice in return for payment in satisfaction of the claims totaling $44,372.57. The supporting Affidavit refers to the history of the controversy, the difficulty in obtaining evidence as to the correct measurement of the subject oilwell pumping equipment, and the attempts to estimate what that equipment would have measured. The parties state that they have been engaged in a genuine dispute but that the critical facts necessary to resolve it are not readily ascertainable, and that they have carefully considered the costs and risks of continued litigation and have decided that their settlement is fair and reasonable and will avoid the need for further extensive, costly and economically unjustified litigation. They aver also that their settlement is a bona fide attempt to terminate a controversy in a commercially reasonable manner and is not a device to circumvent tariff law or any applicable law. The parties furthermore describe the evidentiary basis for their recalculations of freight, i.e., the use of remeasured pumping units as models ("comparison units") when possible and, when not possible, the use of evidence allowing a good-faith estimate of what would have fit in a particular container. Because they are entering into a settlement, however, they make clear that they are abiding by such evidence for purposes of resolving their present dispute and

not for purposes of having such evidence used against them in future cases.[14]

Second, the record in these proceedings establishes with overwhelming clarity that the proposed settlement is bona fide and is not a device for evasion of tariff law. Thus, the record shows that the dispute has been going on for approximately three years between the time Delhi first presented the claims to respondents on August 1, 1985, and the time the parties finally reached settlement and submitted it on August 3, 1988. As I discussed earlier, Delhi presented its claims and different types of supporting evidence to respondents who rejected them three times before the formal complaints were filed with the Commission in January and February 1988. After the parties had presented written evidence and arguments and it had become clear that the cases ought to be settled because of the impossibility of remeasuring the actual pumping equipment in issue, the parties needed another three months or more, starting on or about April 22, 1988, to reach settlement. The history of these two proceedings therefore hardly shows that respondents have been

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[14] It is not necessary for parties to admit violations of law when settling cases, and the Commission has approved many settlements in many types of cases without making findings of violations of law or requiring parties to admit violations. See, e.g., Del Monte Corporation v. Matson Navigation Company, cited above, 22 F.M.C. at 368-369; Maizena S.A. v. Flota Mercante Grancolombiana S.A., cited above, 21 SRR at 525; see also 46 CFR 502.5, Appendix A, Compromise Agreement, para. 3. Furthermore, the condition that concessions made to reach settlements are not to be used in other proceedings as admissions is a recognized principle of law. See Rule 408, Federal Rules of Evidence, 28 U.S.C.A., Advisory Committee's Notes; Merck, Sharp & Dohme v. Atlantic Lines, 17 F.M.C. 244, 247 (1973).

using these proceedings as devices to conceal rebates or that they have caved in to a powerful shipper who had no basis for its claims. However, probably the most salient feature of these cases, which shows that the settlement qualifies under the Glidden-Durkee standards, is the very obvious and ever-present fact throughout these proceedings that the "facts critical to the resolution of the dispute are not reasonably ascertainable." Glidden-Durkee, 18 SRR at 1540. As I have mentioned several times, the problem faced by Delhi was that a number of odd-shaped cargoes consisting of oilwell equipment and parts were shipped and stowed in containers in a certain way many months before the formal complaints were filed with the Commission. The facts necessary to resolve the dispute, i.e., facts showing the actual measurements of the equipment and parts, were not only not reasonably ascertainable but virtually impossible to obtain unless one believes that the equipment could be retrieved from the oil fields in Australia, sent to Houston and repacked by the same packers in the same containers in the same way as they had been originally. Therefore, as explained earlier, Delhi and the parties have had to rely on available, reasonable secondary evidence and to seek reasonable estimates of what the equipment must have measured. Under such circumstances, these two cases are more Glidden-Durkee cases than was the original Glidden-Durkee case itself, in which the issue concerned the difficulty of determining the precise measurements of drums that had been used in transporting chemicals but which had been discarded. At least in Glidden-Durkee, as shown in a companion case, it was

possible to obtain evidence as to what the drums probably measured since they were all supposed to be manufactured to precise specifications.[15] In the present cases, however, obtaining manufacturers' specifications for the oilwell pumping equipment and parts does not suffice because the question to be determined is what did that equipment and those parts actually measure as stowed in containers at the times of the shipments. Moreover, unlike Glidden-Durkee, these cases settle not merely overcharge claims but allegations of unfair or prejudicial treatment in the matter of respondents' hearing the claims, and the parties have amicably resolved those allegations as well as the overcharge claims.

Finally, the amount of the settlement and the recalculations of measurements and freight are not simply based on arbitrary averages, splitting the difference, or some other type of rule of thumb unrelated to the facts. Instead, each recalculation is based upon the use of the most reasonable, available secondary evidence that has so far been developed, i.e., when there is evidence of the measurement of a comparable unit packed in a similar way in a similar container, that measurement figure has

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[15] See Organic Chemicals (Glidden-Durkee) v. Atlanttrafik Express Service, 21 F.M.C. 1082 (19 SRR 322) (1979). This case was a companion to the Glidden-Durkee case that was settled and has been cited earlier. As the companion case shows, when the parties did not settle and had to develop evidence concerning the precise measurement of the discarded drums, they relied upon testimony from the manufacturers, the shipper, and an outside expert, all of whom showed what other standard-sized drums measured and therefore what the actual drums shipped probably measured. Incidentally, the case also indicates that a claim for reparation based on an error in measurement can be supported by indirect evidence. (21 F.M.C. at 1089.)

been used. When there is no suitable model to compare, the parties agreed to estimate the measurement on the basis of the interior capacity of the type of container used, as adjusted to account for the extra heights of the pumping units. This alternative method of measurement has some basis in reason and shipping custom and serves as a useful means to bring a long controversy to conclusion.

For the foregoing reasons, I find that the settlement is fair and reasonable and fully complies with the Commission's standards for approvability set forth in Glidden-Durkee and other cases. The settlement is therefore approved and the complaints are dismissed with prejudice, as requested. These rulings will become effective at a date to be announced by the Commission after the Commission has exercised its right to review. See 46 CFR 502.227(c) and (d).

Norman D. Kline

Norman D. Kline
Administrative Law Judge

(S E R V E D)
(September 19, 1988)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

DOCKET NO. 88-2

DELHI PETROLEUM PTY. LIMITED

v.

U.S. ATLANTIC & GULF/AUSTRALIA-NEW ZEALAND CONFERENCE AND COLUMBUS LINE, INCORPORATED

DOCKET NO. 88-4

DELHI PETROLEUM PTY. LIMITED

v.

U.S. ATLANTIC & GULF/AUSTRALIA-NEW ZEALAND CONFERENCE AND COLUMBUS LINE, INCORPORATED

NOTICE

Notice is given that no appeal has been taken to the August 12, 1988, dismissal of the complaints in these consolidated proceedings and the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissals have become administratively final.

Joseph C. Polking
Secretary